



No. — **77-1118**

**In the Supreme Court of the United States**

OCTOBER TERM, 1977

**FEDERAL TRADE COMMISSION, PETITIONER**

**v.**

**WARNER-LAMBERT COMPANY**

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## In the Supreme Court of the United States

OCTOBER TERM, 1977

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

WARNER-LAMBERT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit that modified the Commission's order, but only if the Court grants the petition for a writ of certiorari in No. 77-855.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51a-86a)<sup>1</sup> and the supplemental opinion on the peti-

<sup>1</sup>"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 77-855. Because the appendices to No. 77-855 contain all of the materials required to be reproduced (see Rule 23(1)(b) of the Rules of this Court), we do not include them as appendices to this cross-petition.



tions for rehearing (Pet. App. 87a-94a) are reported at 562 F. 2d 749. The decision and order of the Federal Trade Commission (Pet. App. 1a-47a) are reported at 86 F.T.C. 1398.

#### JURISDICTION

The judgment of the court of appeals was entered on August 2, 1977. Timely petitions for rehearing were denied on September 14, 1977 (Pet. App. 95a-97a). By order of December 8, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether the Federal Trade Commission may require an advertiser to state, as part of a disclosure necessary to make the advertisement and sale of its product nondeceptive, that the disclosure is "[c]ontrary to prior advertising."

#### STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. (1970 ed.) 45, provided in pertinent part:<sup>2</sup>

<sup>2</sup> After the complaint issued in this case, subsections (a) and (b) of Section 5 were amended by adding the words "or affecting" before "commerce" and by renumbering paragraph (a)(6) as paragraph (a)(2). 88 Stat. 2193, 89 Stat. 801, 15 U.S.C. (Supp. V) 45(a)(1), (2).

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

\* \* \* \* \*

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, \* \* \* from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) \* \* \* If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it \* \* \* shall issue \* \* \* an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. \* \* \*

#### STATEMENT

This petition, like Warner-Lambert's petition in No. 77-855, arises out of efforts by the Federal Trade Commission to correct the consequences of advertisements misrepresenting that Listerine Antiseptic Mouthwash ("Listerine") is beneficial for the treatment of colds and sore throats. Most of the essential facts are set out at pages 2-8 of our brief in opposition to Warner-Lambert's petition.

The Commission required Warner-Lambert to include, in approximately \$10 million worth of future advertising, the statement: "Contrary to prior advertising, Listerine will not help prevent colds or sore

throats or lessen their severity" (Pet. App. 46a). The court of appeals concluded that the Commission properly ordered Warner-Lambert to disclose that Listerine is ineffective as a treatment for colds and sore throats (Pet. App. 54a-60a, 72a-74a). The court modified the Commission's order, however, by deleting the introduction "[c]ontrary to prior advertising."

The court reasoned that the introduction could serve only two purposes: "either to attract attention that a correction follows or to humiliate the advertiser" (Pet. App. 75a). The Commission disclaimed any reliance on the latter purpose, and the court held that the former purpose would be achieved by the fact that the disclosures about colds and sore throats must be made conspicuously (Pet. App. 75a). Therefore, the court concluded, the need for the preamble "is obviated by the other terms of the order" (*ibid.*; footnote omitted) and it is "not warranted" (*id.* at 76a).

#### DISCUSSION

Warner-Lambert's petition (No. 77-855) seeks review of the court of appeals' holdings (i) that the Commission has the statutory authority to order advertisers to disclose facts necessary to correct misimpressions created by prior advertisements and (ii) that the Commission properly exercised its authority to require Warner-Lambert to disclose that Listerine is not effective for the treatment of colds and sore throats. We have opposed Warner-Lambert's petition.

Although the court of appeals modified the Commission's order, the Commission is prepared to accept that modification in this case, provided that the remaining portions of its order are enforced. Because Warner-Lambert has sought review of the portion of the judgment that enforced the Commission's order, however, we have filed this petition so that the Court may consider the entire case if it should conclude, contrary to our argument in No. 77-855, that review is appropriate.

The Commission believes that the court of appeals' modification of its order was improper. "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices \* \* \* and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611, 613.<sup>\*</sup> The court of appeals did not find that the preamble to the corrective language bears "no reasonable relation[ship]" to Warner-Lambert's unlawful practices, and it could not have so found. The preamble is truthful (the information that Listerine is ineffective for the treatment of colds and sore throats is contrary to statements in prior advertising), and the

<sup>\*</sup> See also *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-395; *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-429; *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473.



preamble would serve the salutary purpose of attracting attention to the required disclosure.<sup>4</sup>

Moreover, the preamble does not simply attract attention. It also provides the setting for the disclosure that follows. A correct disclosure about colds in an advertisement that otherwise does not mention colds and sore throats would be mysterious to many listeners and readers. The explanatory words would show why the advertisement refers to colds and sore throats, and it would prevent the confusion that might otherwise arise.<sup>5</sup> Because the corrective portion of the

<sup>4</sup> The Commission has included comparable preambles in consent orders. See, e.g., *Lens Craft Research & Development Co.*, 84 F.T.C. 355, 364; *Wasem's Inc.*, 84 F.T.C. 209, 214; *Boise Tire Co.*, 83 F.T.C. 21, 25; *Pay Less Drug Stores Northwest, Inc.*, 82 F.T.C. 1473, 1481-1488; *Sugar Information, Inc.*, 81 F.T.C. 711, 723; *ITT Continental Baking Co.*, 79 F.T.C. 248, 255. This interpretation by the agency of its authority is entitled to weight, "even though it was applied in cases settled by consent rather than in litigation" (*Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 835, 391).

<sup>5</sup> An editorial in an advertising trade publication, *Advertising Age*, August 15, 1977, p. 16, makes this same point:

"CONFUSION COMPOUNDED

"If the U.S. court of appeals has its way, Warner-Lambert's ads for Listerine will carry in large letters the statement: 'Listerine will not help prevent colds or sore throats or lessen their severity.' Many consumers will be puzzled. 'Why did they stick that in there? It's not related to anything else in the ad.' A few, recalling Listerine ads of the dim past, may be amused by what may seem a twinge of conscience.

\* \* \* \* \*

"FTC had originally ordered that the corrective phrase read: 'Contrary to prior advertising, Listerine will not help prevent

advertisement, standing by itself, might seem out of place or confusing, the preamble not only is rationally related to Warner-Lambert's misconduct but also is necessary to make the disclosure clear.

Finally, the preamble is necessary to make the disclosure effective. It drives home the point that earlier advertisements told a different story, and it alerts listeners to the need to review and alter beliefs that may be held subconsciously.

The court of appeals did not fully explain why it struck the preamble from the material required to be included in future advertisements. Its decision apparently rests, however, on its belief that First Amendment considerations place "a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved" (Pet. App. 65a; footnote omitted).<sup>6</sup> We believe that the preamble satisfies even this demanding standard, and that the court of appeals therefore erred on its own terms. We doubt, however, that the court of appeals applied the proper standard of review.

colds or sore throats or lessen their severity.' The appeals court insisted the power to require corrective ads exists, but it saw no need to 'humiliate' Listerine. So for the record, it's a corrective ad, but the public may see it as a piece of unrelated and unexplained information. \* \* \*

<sup>6</sup> Two other recent cases adopt a similar standard. See *National Commission on Egg Nutrition v. Federal Trade Commission*, C.A. 7, No. 76-1969, decided November 29, 1977, supplemental opinion issued January 23, 1978; *Beneficial Corp. v. Federal Trade Commission*, 542 F. 2d 611 (C.A. 3), certiorari denied, 430 U.S. 983.

This Court has indicated that "[t]he First Amendment \* \* \* does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772. The constitutional inhibitions on regulation of speech do not apply with full force to advertising; "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Bates v. State Bar of Arizona*, No. 76-316, decided June 27, 1977, slip op. 29. "Advertising that is false, deceptive, or misleading of course is subject to restraint. \* \* \* [T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena" (*id.* at 31). The special attributes of commercial speech may "make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Virginia State Board*, *supra*, 425 U.S. at 772 n. 24.<sup>7</sup>

None of this Court's recent decisions intimates that the principles of *Jacob Siegel Co.* and the many

<sup>7</sup> See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (plurality opinion) (referring with approval to the "long \* \* \* recognized" power of the Federal Trade Commission to restrain misleading and false statements in advertisements).

other cases holding that the Commission has substantial leeway in selecting a remedy for false or misleading advertising should be discarded. On the contrary, because the public has an interest in receiving truthful commercial information, the Commission's requirement that Warner-Lambert disclose that statements that Listerine has no therapeutic value in the treatment of colds and sore throats is "contrary to prior advertising" provides the public with valuable information and ensures that the stream of advertising "flow[s] cleanly as well as freely."

The question of the appropriate standard for the Commission and the courts to use in cases of this sort is important; it affects not only contested cases such as the present one but also the background of legal rules against which consent orders are negotiated. If the Court decides to grant review on Warner-Lambert's petition, therefore, it should grant this conditional cross-petition in order to consider the entire case.

## CONCLUSION

If the Court grants Warner-Lambert's petition for a writ of certiorari (No. 77-855), then it also should grant this petition. If it denies Warner-Lambert's petition, then it should deny this petition as well.

Respectfully submitted.

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FEBRUARY 1978.



Supreme Court, U. S.

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FEDERAL TRADE COMMISSION, *Petitioner*

v.

WARNER-LAMBERT COMPANY

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On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

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**BRIEF OF WARNER-LAMBERT COMPANY  
IN OPPOSITION**

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WARNER-LAMBERT COMPANY

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

**BRIEF OF WARNER-LAMBERT COMPANY  
IN OPPOSITION**

**OPINIONS BELOW**

The Opinion and the Supplemental Opinion on Petition for Rehearing of the court below (including the dissents of Judge Robb), set forth at Pet. App. 51a and 87a,<sup>1</sup> are reported at 562 F.2d 749. No opinion

<sup>1</sup> "Pet. App." refers to the appendix to the Petition for Writ of Certiorari in No. 77-855, which arises out of the same proceeding. (See Pet. 1 n.1) "J.A." refers to the Joint Appendix before the court of appeals.



accompanied the denial of the petition for rehearing filed by the Federal Trade Commission. (Pet. App. 97a) The Opinion and Order of the Federal Trade Commission (Pet. App. 1a) and the Initial Decision of the Administrative Law Judge are reported at 86 F.T.C. 1398.

#### JURISDICTION

The judgment of the court of appeals was entered on August 2, 1977. (Pet. App. 51a) Timely petitions for rehearing filed by Warner-Lambert and the Federal Trade Commission were denied on September 14, 1977. (Pet. App. 95a, 96a, and 97a) By order of December 8, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 11, 1978. The petition for a writ of certiorari was filed February 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

#### QUESTION PRESENTED

Assuming *arguendo* that the Federal Trade Commission has the power to order "corrective advertising," may the Commission require that such advertising include a "confessional preamble" indicating that prior advertisements were false where (i) the Commission made no findings of fact in support of the preamble and gave no reasons for including it in its Order and (ii) the advertising claims which are the subject of the confessional preamble were made in good faith and are supported by a responsible body of independent expert opinion.

#### CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

Section 5(a)-(b) of the Federal Trade Commission Act, ch. 311, 38 Stat. 719 (1914), as amended, provided,\* in pertinent part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

\* \* \*

(6) The Commission is empowered and directed to prevent persons, partnerships or corporations, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it . . . shall issue . . . an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice.

Section 8(c) of the Administrative Procedure Act, 5 U.S.C. § 557(c) (1976) provides, in pertinent part:

(c) . . . All decisions including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record. . . .

\* After the complaint issued in this case, Section 5(a)-(b) was amended by adding the words "or affecting" before "commerce" and by repealing paragraphs (a)(2)-(a)(5) and renumbering paragraph (a)(6) as paragraph (a)(2). 15 U.S.C. § 45(a)-(6) (1976).

### STATEMENT

In an Initial Decision filed with the Federal Trade Commission, an Administrative Law Judge of the Commission entered an order requiring that Warner-Lambert Company, for a period of two years, include in all advertisements for Listerine a statement that Listerine would have no beneficial effect on colds or sore throats. (J.A. 588-89) The order further required that the corrective statement contain the confessional preamble, "[c]ontrary to prior advertising." (J.A. 589) \* The Initial Decision contained no findings of fact concerning the confessional preamble and gave no reasons for including it in the order.

On appeal to the Commission, Warner-Lambert objected to the order as a whole, and specifically objected to the requirement that the preamble be included. (J.A. 691-94) The Commission's Order differed from the Administrative Law Judge's order in minor ways not pertinent here, but included the confessional preamble. The Commission's Opinion did not address in any manner the preamble or Warner-Lambert's arguments concerning it.

Before the court of appeals, Warner-Lambert argued that "in the absence of both record support and explication by the Commission of reasonable need," the required preamble must be stricken. The court of appeals ordered the preamble stricken. The court held

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\* In his initial decision, the judge rejected a proposal by complaint counsel that the Federal Trade Commission be named as the source of the correction. The basis for the judge's ruling was his finding that "[s]uch a recitation would be unduly punitive in nature by requiring respondent to indicate that it has been found to be a law violator." (J.A. 585)

that the confessional preamble was "not necessary . . . to assure that the disclosure will reach the public." (Pet. App. 75a) The court further held that because "the record compiled could support a finding of good faith" in making the challenged claims for Listerine, "the confessional preamble to the disclosure is not warranted." (Pet. App. 76a) \* A petition for rehearing by the Federal Trade Commission was denied by the panel without dissent. (Pet. App. 97a)

### ARGUMENT

In support of its petition for a writ of certiorari, the Federal Trade Commission has argued that in striking the confessional preamble to the Commission's corrective advertising order, the court of appeals "discarded" established principles governing the review of Federal Trade Commission orders. (Pet. 9) In fact, the complete absence of findings by the Commission in support of the confessional preamble and the Commission's failure to state any reason for including it in the Order compelled its rejection by the court of appeals under the very principles invoked by the Commission. Moreover, the court of appeals recognized and properly held that the confessional preamble was particularly inappropriate on the facts of this case.

The Commission has requested that its petition be granted only if this Court grants Warner-Lambert's petition in No. 77-855. In so conditioning its petition, the Commission has in effect conceded that the questions raised by its petition do not in themselves merit

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\* The court of appeals affirmed the balance of the Commission's Order. This ruling is the subject of Warner-Lambert's petition for a writ of certiorari in No. 77-855.



consideration by this Court. Warner-Lambert's petition raises important constitutional and statutory questions concerning the Commission's fundamental authority to order "corrective advertising," a newly-asserted authority never before reviewed by the courts. The determination by the court of appeals that a particular phrase in the Commission's Order lacked a proper factual predicate and was not warranted in the factual context presented to the court does not raise questions of remotely comparable importance, and review of the court of appeals' determinations concerning those factual questions will contribute nothing to the consideration of the important issues raised in Warner-Lambert's petition. In these circumstances, the Commission's cross-petition should be denied.

1. The Federal Trade Commission has devoted a substantial portion of its petition to assertions that the confessional preamble stricken by the court of appeals "would serve" or is "necessary" to achieve one "salutory [sic] purpose" or another. (Pet. 5-7) Significantly, this portion of the petition contains no reference to any factual material before the Commission or to any finding or analysis made by the Commission itself.<sup>\*</sup> In fact, even though the requirement of a confessional preamble is an exceptional remedy not previously ordered in litigated cases (*see* Pet. 6 n.4), neither the Commission's Opinion nor the Initial Decision which preceded it referred to the preamble at all.

<sup>\*</sup> The complete absence of a factual or analytical predicate for the confessional preamble is highlighted by this and by petitioner's reliance on a single "editorial in an advertising trade publication" critical of the court of appeals' opinion (Pet. 6 n.5) as the only factual support for the preamble.

Orders of administrative agencies such as the Federal Trade Commission must be supported by findings of fact and accompanied by a statement of the basis and reasons for important provisions of the orders. Such findings and analysis are required by the Administrative Procedure Act, 5 U.S.C. § 557(c) (1976), and are essential if courts are properly to perform their reviewing function, *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Papercraft Corp. v. FTC*, 472 F.2d 927, 931-33 (7th Cir. 1973); *FTC v. Crowther*, 430 F.2d 510, 514 (D.C. Cir. 1970). This is particularly true when an order contains something which is "by no means a standard remedial provision." *Papercraft Corp. v. FTC*, 472 F.2d at 931. The use of "novel provisions" or an "exceptional remedy" cannot be accepted in the absence of "careful analysis" and "an adequate demonstration of the need" for such a remedy. 472 F.2d at 932-933. When such provisions have been upheld, the "exceptional relief was supported by findings describing an unusual history of predatory behavior," or there were other "findings [which] clearly supported" the exceptional relief ordered. 472 F.2d at 931 n.12.

Arguments by counsel on appeal cannot be used to justify an order in the absence of findings or analysis by the agency itself. Here, the Commission's "action must be measured by what [it] did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. at 93-94.<sup>\*</sup>

<sup>\*</sup> In *Chenery*, 318 U.S. at 94 (citation omitted), this Court explained that:

[t]he Commission's action cannot be upheld merely because findings might have been made and considerations disclosed



Petitioner also has wrongly criticized the court of appeals for its "belief that First Amendment considerations place 'a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved'" (Pet. 7). This Court and numerous lower courts long have recognized that determining whether a remedy bears a "'reasonable relation[ship]'" to the violation found, the standard as expressed by the Commission (Pet. 5), requires a determination of whether the relief ordered unnecessarily infringes upon important rights. *Jacob Siegel Co. v. FTC*, 327 U.S. at 612-613; *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933); *National Commission on Egg Nutrition v. FTC*, 1977-2 Trade Cas. ¶ 61,751 at 73,100 (7th Cir. 1977), supplemental opinion, 1978 Trade Cas. ¶ 61,877 (7th Cir. 1978); *Magnaflo Co. v. FTC*, 343 F.2d 318, 320-321 (D.C.Cir. 1965); *Papercraft Corp. v. FTC*, 472 F.2d at 931, 933; *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3rd Cir. 1976), cert. denied, 430 U.S. 983 (1977). There is no reason to assume, as the Commission does, that First Amendment rights are entitled to lesser protection.'

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which would justify its order as an appropriate safeguard for the interest protected by the Act. There must be such a responsible finding. There is no such finding here.

' In *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), this Court charged lower courts dealing with restrictions on commercial speech with "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." Subsequently, this Court struck down such restrictions in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and in *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), in part because the restrictions imposed were not shown to be necessary to achieve the objective to be served. 431 U.S. at 95.

The court of appeals, in striking the "confessional preamble" from the Commission's Order, properly applied settled principles requiring that Federal Trade Commission orders be supported by appropriate findings of fact and an expression of the reasons for which the particular relief was ordered. The recognition by the court of appeals of a "special responsibility" to avoid unnecessary incursions on First Amendment rights properly followed recent decisions by this Court and is conceded to be consistent with applications of those decisions by other circuits in *Egg Nutrition* and *Beneficial* (Pet. 7 n.6).

2. In its discussion at Pet. 4-9, petitioner fails to address the consideration by the court of appeals of the propriety of a "confessional preamble" in the circumstances of this case. The court of appeals concluded that a confessional preamble "might be called for in an egregious case of deliberate deception, but this is not one." (Pet. App. 76a, footnote omitted) Rather, the court of appeals found that "the record compiled could support a finding of good faith" in making the advertising claims the Commission found "false." (Pet. App. 76a, footnote omitted)

The Commission's preamble would have required Warner-Lambert to "confess" that prior advertisements had been false. The court of appeals was presented with the following circumstances surrounding the advertisements found "false" by the Commission:

- (1) The advertising claims in question had been the subject of numerous reviews by the Commission, were included in an earlier compliance report accepted by the Commission,

and had been fully litigated before the Commission, *Lambert Pharmacal Co.*, 38 FTC 726 (1944), with the complaint dismissed. (J.A. 2738-40)

- (2) The Administrative Law Judge of the Federal Trade Commission had ruled that the company acted reasonably in relying on earlier studies which had been reviewed previously by the Commission and which supported the principal claims now found "false." (J.A. 562-64)
- (3) The claims found to be "false" were supported by a responsible body of expert opinion and by clinical studies, both of which the Commission elected to disregard in favor of the opinions of experts it had called to testify. (See portions of record cited at p. 11 n.11 of Pet. in No. 77-855.)
- (4) An expert panel appointed by the Food and Drug Administration subsequently determined that the principal study rejected by the Commission demonstrated that Listerine provided an "overall alleviation of symptoms" and, more particularly, "revealed milder nasal symptoms and cough symptoms in individuals using" Listerine, and included Listerine and certain of its active ingredients among those found, by the panel's own definition, "likely to be effective" for the relief of certain cold symptoms. 41 Fed. Reg. 38312, 38319, 38348-53, 38409-13 (1976).

The court of appeals was well justified in determining that "[o]n these facts, the confessional preamble to the disclosure is not warranted." (Pet. App. 76a)

In *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957), this Court held that "the circumstances under which . . . illegal acts occurred" are properly to be

considered in framing relief. Acts "in utter disregard of law . . . 'call for repression by sterner measures than where the steps could reasonably have been thought permissible.'" *Id.* (citation omitted). See *Papercraft Corp. v. FTC*, 472 F.2d at 931 n.12. Here, the court of appeals quite properly concluded that the circumstances surrounding the Commission's finding of a violation of the Federal Trade Commission Act were not such that it would be proper "to humiliate the advertiser" by requiring a public confession of wrongdoing (Pet. App. 75a-76a).

#### CONCLUSION

The conditional cross-petition of the Federal Trade Commission for a writ of certiorari does not present any question which is either important in itself or relevant to this Court's consideration of the constitutional and statutory questions presented in Warner-Lambert's petition in No. 77-855. In these circumstances, the cross-petition should be denied.

Respectfully submitted,

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